

BORA LASKIN LAW LIBRARY



3 1761 06101508 7



UNIVERSITY OF TORONTO  
FACULTY OF LAW

PROPERTY LAW: 2010-2011

VOLUME TWO

J. Phillips  
Faculty of Law  
University of Toronto

Storage

KE  
618  
.P45  
2010  
v.2  
c.1

Materials are reproduced solely for the use of students in the Faculty of Law,  
University of Toronto.

BORA LASKIN LAW LIBRARY

NOV 17 2010

FACULTY OF LAW  
UNIVERSITY OF TORONTO

**PROPERTY LAW: 2010-2011**

**VOLUME TWO**

**J. Phillips  
Faculty of Law  
University of Toronto**

**These materials are reproduced solely for the use of students in the Faculty of Law,  
University of Toronto.**



## TABLE OF CONTENTS - VOLUME TWO

### CHAPTER FIVE: CO- OWNERSHIP

<u>(a) Introduction</u> .....	208
<u>(b) Joint Tenancy or Tenancy in Common?</u> .....	210
<u>Ziff, Principles of Property Law</u> .....	211
<u>Common Law, Equitable, and Statutory Rules</u> .....	214
<u>c) Severance of Joint Tenancies</u> .....	217
<u>Burgess v. Rawnsley</u> .....	218
<u>Re Tompkins Estate</u> .....	222
<u>Notes</u> .....	223
<u>(d) Relations Between Co-Owners</u>	
<u>Introduction</u> .....	225
<u>Reid v. Reid</u> .....	226
<u>Leigh v. Dickeson</u> .....	228
<u>(e) Partition or Sale</u>	
<u>Introduction</u> .....	230
<u>Re Dibattista et al and Menecola et al</u> .....	231
<u>(f) Problem</u> .....	234
<u>(g) A Note on Condominiums</u> .....	236

## CHAPTER SIX: SERVITUDES PART 1 - EASEMENTS

(a) Introduction .....	239
(b) Characteristics of Easements .....	240
<i>In Re Ellenborough Park</i> .....	240
Notes .....	249
Positive and Negative Easements .....	249
<i>Phipps v. Pears</i> .....	250
(c) Creation by Express Grant - Express Grants and Reservations .....	252
(d) Creation by Implication	
Introduction: The General Rules .....	253
Exceptions to the General Rules .....	254
<i>Wong v. Beaumont Property Trust</i> .....	258
<i>Sandom v. Webb</i> .....	261
<i>Barton v. Raine</i> .....	266
Problems .....	270
(e) The Scope of Easements, and Termination .....	272

---

## CHAPTER SEVEN: SERVITUDES PART II - RESTRICTIVE COVENANTS

(a) Introduction .....	274
(b) Covenants and the Common Law .....	277

<i>Austerberry v. Oldham</i> .....	277
Note on Touch and Concern .....	279
 (c) Restrictive Covenants: Running the Burden in Equity .....	281
<i>Tulk v. Moxhay</i> .....	282
Negativity .....	284
The Need for a Dominant Tenement .....	285
<i>London County Council v. Allen</i> .....	285
The Covenant Must Touch and Concern the Land .....	289
<i>Galbraith v. Madawaska Club</i> .....	289
Note .....	291
 (d) Restrictive Covenants: Running the Benefit in Equity .....	292
<i>Victoria University v. Heritage Properties Ltd.</i> .....	294
Note .....	298
 (e) Termination of Restrictive Covenants .....	299
 (f) Notes	
The Burden of Positive Covenants .....	301
Types of Covenants .....	303





Digitized by the Internet Archive  
in 2018 with funding from  
University of Toronto

[https://archive.org/details/propertylaw02phil\\_1](https://archive.org/details/propertylaw02phil_1)



## CHAPTER FIVE - CO - OWNERSHIP

### (A) INTRODUCTION

We have seen that the common law permits "shared" ownership where ownership is divided by time - for example, the life tenancy and the reversion in fee simple. It also permits two or more persons to own property and to have simultaneous rights in it. When this happens they are said to hold jointly, to be co-owners, or to have concurrent interests in the property. Any estate known to the law, and all types of property, can be the subject of co-ownership.

The term co-ownership here does not refer to that increasingly ubiquitous modern form of urban living, the condominium, or land subject to 'strata title'. There is more on condominiums later in the chapter. Rather, we are talking about one interest in property being owned by two or more people.

The common law has long permitted co-ownership, and to complicate matters there is more than one form of co-ownership. Historically there were four, but only two now concern us. Cheshire, *Modern Law of Real Property*, gives the following explanation:

There are four possible forms of co-ownership, one of which, tenancy by entireties, is now defunct; while another, coparcenary, seldom arises. The two found in practice are joint tenancy and tenancy in common....

The two essential attributes of joint tenancy which must be kept in mind ... are the absolute unity which exists between joint tenants, and the right of survivorship.

There is, to use the language of Blackstone, a thorough and intimate union between joint tenants. Together they form one person. This unity is fourfold, consisting of unity of title, time, interest and possession. All the titles are derived from the same grant and become vested at the same time; all the interests are identical in size; and there is unity of possession, since each tenant *totum tenet et nihil tenet*. Each holds the whole in the sense that in conjunction with his co-tenants he is entitled to present possession and enjoyment of the whole; yet he holds nothing in the sense that he is not entitled to the exclusive possession of any individual part of the whole. Unity of possession is a feature of all forms of co-ownership.

For this reason one joint tenant cannot, as a general rule, maintain an action of trespass against the other or others, but can do so only if the act complained of amounts either to an actual ouster, or to a destruction of the subject matter of the tenancy.

## CHAPTER SIX

### SERVITUDES PART 1 - EASEMENTS

#### A) INTRODUCTION

An easement is one of the class of rights in land known as "incorporeal hereditaments", or sometimes as "servitudes". It is essentially the right of one landowner to go onto the land of another and make some limited use of it. It is not a "natural right", it does not come with the fee simple, and must therefore be created as part of the relationship between the two landowners. There are many types of easements, in the sense that there are many different kinds of things which can be the subject of an easement. There is also more than one way to create an easement. Perhaps the most common kind of easement is the right of way created by express agreement of the parties, and I will use that paradigmatic situation as an illustration

Imagine that A owns land bordered on three sides by woods, and on one side by a road. A wishes to sell part of the land, and B wishes to buy part of it. But A wants to sell a part that does not border on the road. B is not going to buy if getting to the grocery store entails, at best, hacking a path through the woods assuming that B has a right to go through the woods. If not, a helicopter will be required. The solution is simple as part of the agreement by which she buys the land from A, B also obtains the right to cross A's land to get to the road. Presumably A will extract some price for this, some increase in B's purchase price, but it matters not to the law whether payment is given, only that the agreement has been made.

Easements are a relationship between two parcels of land - the dominant tenement and the servient tenement. In this example the land that is reached by crossing the other parcel is the dominant tenement; the land that is crossed is the servient tenement, it serves the dominant tenement.

If an easement has been created by one of the methods acceptable to the law (an issue dealt with in sections (c) and (d) of this chapter), and if the right granted meets the necessary test as being the kind of thing allowed by the law of easements (an issue discussed immediately below in section (b)), then it will generally run with the land, be a part of title. That is, if the easement is created during the period that A and B own the two pieces of land, and A then sells to C and B sells to D, C



and D are in the same position as landowners as A and B were. This is what makes the easement a property right, for the original agreement between A and B could be enforced merely as a contract, as could any other agreement between them. But if the particular right created by the initial contract is an easement, it becomes part of the title, part of the fee simple that each successor owner has, it has an existence independent of the identity of the owner of the land at any given time.

## B) CHARACTERISTICS OF EASEMENTS

The first issue we will look at is that of what kinds of rights the law will consider to constitute valid easements. The common law will not simply consider any agreement between two landowners to have created an easement. To qualify, the right granted must meet the four fold test laid out in Ellenborough Park below. In that case there was no question that an agreement was made between vendors and purchasers in 1855; but only if that agreement created a right in the nature of an easement can it still be enforced 100 years later. The four principal requirements are laid out below, and you should make sure that you understand what each means and how the court assesses them in light of the facts of the case.

### IN RE ELLENBOROUGH PARK, [1956] 1 Ch. 131 (C.A.)

In 1855, Ellenborough Park at Weston super Mare and the surrounding property, being freehold land then open and unbuilt on, belonged to two tenants in common who sold, for building purposes, the plots surrounding the park. The conveyances of the plots were in similar form granting to each purchaser "the full enjoyment at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground [Ellenborough Park] ... but subject to the payment of a fair and just proportion of the costs charges and expenses of keeping in good order and condition the said pleasure ground." Each purchaser covenanted to pay a fair proportion of the expenses of making the pleasure ground and at all times keeping it in good order and condition and well stocked with plants and shrubs. The vendors covenanted with each purchaser, his heirs, executors, administrators and assigns, at the expense of the purchaser, his heirs, executors, administrators or assigns and all others to whom the right of enjoyment of the pleasure ground might be granted to keep Ellenborough Park as an ornamental pleasure ground. Danckwerts J. held that the right to use the pleasure ground was a right known to the law and an easement, and that accordingly the purchasers of plots and their successors in title had legal and effective easements so to use Ellenborough Park.





## CHAPTER SEVEN

### SERVITUDES PART II - RESTRICTIVE COVENANTS

#### A) INTRODUCTION

Restrictive covenants are, like easements, a form of incorporeal hereditament. Begin with the notion that a covenant is an agreement under seal, one contained in a deed. In the context of real property law, it is an agreement by which one person agrees to do something, or not to do something, with his or her land, for the benefit of the other party. As with an easement created by express grant, we can use contract law to say that the terms of the covenant are enforceable as between the original parties. But, again similarly to an easement, the issue is when the terms of the covenant become attached to the land, as part of title to it, and are therefore enforceable by and against successors in title to the original contracting parties. That is, at what point will the law consider the covenant to be an interest in land so that it can be enforced between parties who have no privity.

An obvious question which will occur to you at this point is - what is the difference between covenants and easements? I am not going to answer this fully at the moment, because the entire answer requires us to understand the whole chapter. But for the present you can usefully think of a covenant as (a) requiring an owner to do something or not do something with his or her own land, whereas an easement gives its holder the right to go onto another's land, and (b) as an agreement containing terms and conditions that would not amount to an easement by the characteristics outlined in *Ellenborough Park* or because of the restrictions on negative easements noted in *Phipps v. Pears*. There are other differences, but the point is that covenants principally affect servient land, while easements only do so inferentially, and that covenants are potentially much wider in scope than easements - although there are limits on which type of covenants can go with title. We will see that covenants are much more difficult to enforce against successors-in-title than easements, and thus you would never attempt to argue that something like a right of way was a covenant.

A paradigm restrictive covenant (that's a term of art which will be explained later) would be a limit on the kind of development that one land owner could undertake. That is, you own land and sell half of it off. You know the purchaser is a yuppie stockbroker who would want to build a large, ugly house and paint it pink. You insert

## CHAPTER EIGHT

### PROPERTY, POLITICS, THE CONSTITUTION AND THE STATE

#### A) INTRODUCTION

It is a commonplace of political philosophy that the western liberal tradition places great emphasis on the freedom of the individual. This freedom is often discussed in terms of freedom from control by others, especially the state. It is also often contended that private property serves a crucial role in protecting and enhancing such freedom. Professor Jeremy Paul, for example, states that property acts "as protector of individual rights against other citizens and as safeguard against excessive government interference": "The Hidden Structure of Takings Law", (1991) 64 *Southern California Law Review* 1393. The same point was made many years ago by Morris Cohen, one of the leading legal realists, who argued that private property gives those who have enforceable claims to resources power over their own lives and a measure of power over the lives of others: "Property and Sovereignty", (1927) 13 *Cornell Law Quarterly* 8.

The enhancement of individual liberty is therefore often cited as a justification for private property in general. More particularly, it also serves as an argument for putting into private hands as many as possible of the strands in the bundle of rights that property represents. But no society places the whole bundle in individual hands, for all recognise that to one degree or another individual property rights must give way to society's collective goals. This is most obviously achieved by taxation, but there are a host of others ways in which this is also done, some of which we have discussed above - see the debate over property and discrimination. The first substantive section of this chapter examines another area where public goals and private rights, or perhaps the private rights of the few and the private rights of the many, collide - takings.

The second section of this chapter examines a somewhat different, but related, aspect of the relationship between property and the state - the extent to which citizens should have some entitlement to a minimum level of property. This introductory note began by talking about property as providing freedom from government interference. But it has long been recognised that this negative liberty is not the only kind of liberty. There is also such a thing as positive liberty, the freedom to live a full life, which may







